

STATE OF MICHIGAN
COURT OF APPEALS

CATHERINE M. FECHIK,

Plaintiff-Appellee,

v

DELTA LAND SURVEYING AND
ENGINEERING, INC.,

Defendant-Appellant.

UNPUBLISHED
February 22, 2005

No. 251090
Genesee Circuit Court
LC No. 99-065321-NZ

Before: Fort Hood, P.J. and Griffin and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from a circuit court order denying its motion for attorney fees and costs against plaintiff for allegedly bringing a frivolous suit in this case. Because there were significant grounds to support reasonable argument for the modification of Michigan law to allow such claims, we affirm the denial of sanctions. This case is being decided without oral argument under MCR 7.214(E).

A trial court's decision to deny a motion for sanctions based on a claim that an action is frivolous is reviewed for clear error. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997). Such a decision is clearly erroneous if the reviewing court is left with a firm and definite conviction that a mistake has been made. *Id.*

While not cited by the parties, *Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517; 644 NW2d 765 (2002), is instructive in indicating that plaintiff did not act frivolously by bringing the present suit. In that case, this Court affirmed the trial court's grant of summary disposition in favor of realtors based on a holding that they were not liable to a buyer because they were agents of the seller. *Id.* at 529-531. Nevertheless, this Court reversed the trial court's award of sanctions in favor of the realtors for the bringing of a frivolous complaint with regard to the matter. *Id.* at 531-532. This Court stated that, considering the buyer's reliance on statements and actions by the realtors and that the buyer dealt almost exclusively with the realtors during the relevant transaction, "we cannot deem [the buyer's] attempt to hold the realtors liable for their actions as being devoid of arguable legal merit." *Id.* at 532. Quite similarly, it appears undisputed that plaintiff paid for the mortgage report at issue in this case and relied on its contents. As in *Lakeside Oakland Development*, plaintiff's attempt to hold defendant liable for the alleged error in the mortgage report does not appear to be so unreasonable as to be devoid of arguable legal merit or otherwise frivolous.

In this regard, defendant emphasizes its view that plaintiff's position was unsupported by prevailing Michigan law, but gives no consideration to the language of MCR 2.114(D)(2), part of the court rule governing sanctions for frivolous claims, indicating that a legal pleading may be supported by "a good-faith argument for the extension, modification, or reversal of existing law." Given that a circuit court is bound to attempt to follow Michigan law as established or articulated in controlling precedent of this Court or our Supreme Court, it is inherent in this principle that an action is not frivolous merely because a circuit court would be bound to reject the claims presented by a party because the party could nevertheless bring an action in good faith with a view to eventually appealing or attempting to appeal the matter to this Court or our Supreme Court in an effort to obtain a change in Michigan law.

While, in this case, this Court ultimately gave effect to the language of the mortgage report disclaiming liability to plaintiff and to legal principles that appear to effectively limit any potential liability of defendant for inaccuracies in the mortgage report to only the mortgagee, we believe that one could plausibly, even though ultimately unsuccessfully, argue that public policy should allow for a suit by plaintiff as a property owner against defendant in this circumstance. In particular, the apparently undisputed fact that plaintiff paid for the mortgage report and that it was obviously intended to be relied on by the mortgagee with regard to its contents could plausibly be viewed as substantial reasons for plaintiff to trust the accuracy of the report. Further, disallowing defendant to disclaim liability to prospective purchasers of property such as plaintiff would arguably provide it with greater incentive to prepare accurate reports. Of course, there are countervailing considerations such as the general freedom to contract which would normally allow a party to limit the scope of its duty in a contract and the possibility that defendant's disclaimer of liability to prospective property purchasers is reasonably related to the possibly limited nature of the research it performs in preparing a mortgage report. Nevertheless, although neither this Court nor our Supreme Court decided to use this case to alter Michigan law to allow either of the claims brought by plaintiff to proceed, that does not mean the claims were frivolous because there were significant grounds to support reasonable argument for the modification of Michigan law to allow those claims. Accordingly, the trial court did not clearly err by denying defendant's motion for sanctions because there is no basis for this Court to have a firm and definite conviction that plaintiff acted frivolously by bringing this suit. *Schadewald*, *supra* at 41.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio